Supreme Court, U.S.
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No. 87-5002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ELLIS T. McCOY, Etc.,

Appellant,

v.

WISCONSIN COURT OF APPEALS,
DISTRICT I,

Appellee.

On Appeal From The
Supreme Court of Wisconsin

BRIEF FOR THE APPELLANT

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QUESTION PRESENTED

Is Wis. Rule § 809.32(1) unconstitutional to the extent that it requires a defense attorney in a criminal appeal to discuss in a no merit brief why the issue that might arguably support the appeal lacks merit?

PARTIES BELOW

The parties in the Supreme Court of Wisconsin were petitioner State of Wisconsin ex rel. Ellis T. McCoy, by Louis B. Butler, Jr., Assistant Wisconsin Public Defender, Relator Ellis T. McCoy and the Wisconsin Court of Appeals, District I.

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OPINION BELOW

The opinion of the Wisconsin Supreme Court is reported as *State of Wisconsin ex rel. Ellis T. McCoy* v. *Wisconsin Court of Appeals, District I*, 137 Wis. 2d 90, 403 N.W.2d 449 (1987). (J.A. 108-125).

JURISDICTION

The decision of the Wisconsin Supreme Court was entered April 9, 1987. The appellant's notice of appeal was filed in the Wisconsin Supreme Court on May 21, 1987, and docketed in this Court on May 22, 1987. Probable jurisdiction was noted in this Court on October 5, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (1970).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENTS TO THE UNITED STATES CONSTITUTION

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defence.

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

WISCONSIN CONSTITUTION

ARTICLE I

Rights of Accused. SECTION 7. In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

Prosecutions; double jeopardy; self-incrimination; bail; habeas corpus. SECTION 8. [As amended Nov. 1870 and April 1981] (1) No person may be held to answer for a criminal offense without due process of law, and no person for the same offense may be put twice in jeopardy of punishment, nor may be compelled in any criminal case to be a witness against himself or herself.

Rights of suitors. SECTION 21. [As amended April 1977] (1) Writs of error shall never be prohibited, and shall be issued by such courts as the legislature designates by law.

(2) In any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor's choice. [1975 J.R. 13, 1977, J.R. 7, vote April 1977]

WISCONSIN STATUTES AND COURT RULES INVOLVED

808.03 (1983-84) Appeals to the court of appeals. (1) APPEALS AS OF RIGHT. A final judgment or a final order of a circuit court may be appealed as a

matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment or order entered in accordance with s. 806.06(1)(b) or 807.11(2) or a disposition recorded in docket entries in traffic regulation cases and municipal ordinance violation cases prosecuted in circuit court which disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding.

809.25(1983-84) Rule . . . .

(3) FRIVOLOUS APPEALS. (a) If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs and fees under this section.

(b) The costs and fees awarded under par. (a) may be assessed fully against the appellant or cross-appellant or the attorney representing the appellant or cross-appellant or may be assessed so that the appellant or cross-appellant and the attorney each pay a portion of the costs and fees.

(c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:

1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

. . . .

809.30 (1983-84) Rule (Appeals in felony cases). (1) APPEAL OR POSTCONVICTION MOTION BY DEFENDANT. (a) An appeal or motion for postcon-

viction relief by a defendant in a felony case must be taken in accordance with this subsection.

(b) The trial judge shall inform the defendant at the time of sentencing or imposition of a fine or probation of the right to appeal or seek other postconviction relief, the time limits on seeking the relief and, if indigent, the right to publicly compensated counsel in those proceedings.

(c) If the defendant claims or appears to be indigent and wishes to have publicly compensated counsel to represent the defendant in seeking postconviction relief, the defendant shall notify the state public defender within 45 days of the date of sentencing or imposition of fine or probation. The state public defender shall within 60 days of notification by the defendant determine the defendant's indigency and appoint counsel as provided in ch. 977, and at the same time shall request the court reporter to prepare the transcript of notes of the proceedings in the case.

. . . .

809.32 (1983-84) Rule (No merit reports) (1). If an attorney appointed under s. 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant, who may file a response to the brief within 30 days of service.

(2) The attorney shall file in the trial court a notice of appeal of the judgment of conviction and of any order denying a postconviction motion. The clerk of the trial court shall transmit the record in the case

to the court pursuant to s. 809.15. The no merit brief and notice of appeal must be filed within 180 days of the service upon the defendant of the transcript under s. 809.30(1)(e).

(3) In the event the court of appeals finds that further appellate proceedings would be frivolous and without any arguable merit, the court of appeals shall affirm the judgment of conviction and the denial of any postconviction motion and relieve the attorney of further responsibility in the case. The attorney shall advise the defendant of the right to file a petition for review to the supreme court under s. 809.62.

(4) If a fully briefed appeal is taken to the court of appeals and the attorney is of the opinion that a petition for review in the supreme court under s. 809.62 would be frivolous and without any arguable merit, the attorney shall advise the defendant of the reasons for this opinion and that the defendant has the right to file a petition for review. If requested by the defendant, the attorney shall file a petition satisfying the requirements of s. 809.62(2)(d) and (f) and the defendant shall file a supplemental petition satisfying the requirements of s. 809.62(2)(a), (b), (c) and (e). The petition and supplemental petition shall both be filed within 30 days of the date of the decision of the court of appeals. An opposing party may file a response to the petition and supplemental petition within 10 days of the service of the supplemental petition.

967.06 (1983-94) Determination of indigency; appointment of counsel; preparation of record. As soon as practicable after a person has been detained or arrested in connection with any offense which is punishable by incarceration, or in connection with any civil commitment proceeding, or in any other situation in which a person is entitled to counsel regardless of ability to pay under the constitution or laws of the United States or this state, the person shall be informed of his or her right to counsel. Per-

sons who indicate at any time that they wish to be represented by a lawyer, and who claim that they are not able to pay in full for a lawyer's services, shall immediately be permitted to contact the authority for indigency determinations specified under s. 977.07(1). The authority for indigency determination in each county shall have daily telephone access to the county jail in order to identify all persons who are being held in the jail. The jail personnel shall provide by phone information requested by the authority. In any case in which the state public defender provides representation to an indigent person, the public defender may request that the applicable court reporter or clerk of courts prepare and transmit any transcript or court record. The request shall be complied with. The county treasurer shall compensate the court reporter or clerk of courts for the preparation and transmittal of the documents, upon the written statement of the state public defender that the documents were required in order to provide representation to the indigent person.

STATEMENT OF THE CASE

This matter is before the court on appeal from an original action before the Wisconsin Supreme Court. It arises, however, out of the case of *State* v. *Ellis T. McCoy*, No. 84-929-CR-NM (J.A. 11). Mr. McCoy was convicted in Milwaukee County Circuit Court on December 2, 1983, of one count of second degree sexual assault, contrary to Wis. Stats. § 940.225(2)(a) (1983-84), and one count of abduction, contrary to Wis. Stats. § 940.32(1) (1983-84), the Honorable William A. Jennaro presiding (J.A. 17-18). Upon conviction, he was sentenced to six years, each count, to be served consecutively at the Dodge Correctional Institution at Waupun, Wisconsin (J.A. 18).

The petitioner in the Wisconsin Supreme Court represents the appellant, Ellis T. McCoy, in the case of *State* v.

McCoy, No. 84-929-CR-NM, now pending in the Wisconsin Court of Appeals, District I (J.A. 4). After doing research in preparation for filing the brief in that action, counsel concluded that further appellate proceedings on behalf of Mr. McCoy would be frivolous and without any arguable merit within the meaning of *Anders* v. *California*, 386 U.S. 738 (1967) and Rule § 809.32(1) (J.A. 4-5). Counsel discussed the matter by telephone twice with Mr. McCoy, who was advised that his options included voluntarily dismissing the appeal, proceeding *pro se* or requiring the petitioner to file a no merit report (J.A. 5). Mr. McCoy opted for a no merit report (J.A. 5).

A motion was filed on behalf of Mr. McCoy before the Wisconsin Court of Appeals on August 14, 1984, to determine the constitutionality of Rule 809.32(1) and clarify the scope of counsel's representation on appeal (J.A. 5-7). The motion alleged that that portion of Rule 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on McCoy's sixth amendment right to counsel (J.A. 6-7).

The Wisconsin Court of Appeals, District I, denied the motion on September 7, 1984, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no justiciable controversy exists involving the constitutionality issue." (J.A. 8-9).

Counsel filed a "no merit" brief on October 22, 1984, which was in compliance with *Anders* and the subsequent decision of *Evitts* v. *Lucey*, 469 U.S. 387, 394 (1985), but not in compliance with Wis. Rule § 809.32(1) (J.A. 11-27). In an introduction to that brief, counsel pointed out that the rule and *Anders* could not be reconciled, and that

he was ethically obligated to protect his client's sixth amendment right to counsel on appeal (J.A. 14-16). A copy of the no merit brief was served on McCoy, who was given 30 days to file any response he wished the court to consider (J.A. 28).

The court of appeals, in an order dated April 16, 1985, ordered that the brief previously filed on October 22, 1984, be struck for noncompliance with Wis. Rule § 809.32(1) because reasons why the issues lacked merit were not included (J.A. 29-30). The court also ordered that counsel file a new brief which was in compliance with the rule within fifteen (15) days of the date of that order (J.A. 30).

Counsel filed a petition for a supervisory writ of prohibition and declaration of relator's rights in the Wisconsin Supreme Court dated April 23, 1985 (J.A. 31-36). [app. omitted]. The court, however, in an order dated May 8, 1985, ruled that counsel was not entitled to a supervisory writ and declaratory relief from that court for the reason "that he has an adequate remedy in the court of appeals by renewing his motion for a determination of constitutionality of sec. (Rule) 809.32(1), Stats." (J.A. 37-38).

Counsel renewed his "Motion to Determine Constitutionality of Rule 809.32(1) and to Clarify Scope of Attorney's Representation on Appeal" in the court of appeals in a motion dated June 4, 1985 (J.A. 39-44). [App. omitted]. The court of appeals once again denied counsel's motion in an order amended January 16, 1986, stating that the "constitutionality of sec. 809.32(1), Stats., must be determined by its supreme court authors and not by a court bound to obey what the court creates." (J.A. 46). The court again directed counsel to file a brief in compliance with Wis. Rule § 809.32(2) within fifteen (15) days of the date of the order (J.A. 47).

Counsel renewed his "Petition for Supervisory Writ of Prohibition and Declaration of Relator's Rights" in the Wisconsin Supreme Court on January 24, 1986 (J.A. 48-55). The court granted the petition, insofar as it sought a declaratory judgment with respect to the constitutionality of Wis. Rule § 809.32(1) in an order dated March 27, 1986 (J.A. 106-107). The court also held the petition for a supervisory writ of prohibition in abeyance pending further order of the court (J.A. 107).

The Wisconsin Supreme Court, in a decision entered April 9, 1987, upheld the constitutionality of Wis. Rule § 809.32(1). *McCoy, supra* (J.A. 108-125). The court admitted that the Wisconsin no merit procedure goes beyond *Anders* and requires an attorney to file a brief which includes a statement indicating why the appeal lacks merit. 137 Wis. 2d at 95 (J.A. 112). The court, however, stated that "[w]hile Anders does not sanction the use of the discussion requirement, it does not proscribe it, either." 137 Wis. 2d at 97 (J.A. 114). The court stated that ". . . we believe the rule requires an attorney to fulfill a duty that co-exists with the duty owed to the client—that duty which is owed to the court. The court will be better equipped to make the correct decision about the potential merits of the appeal if it has before it not only the authorities which might favor an appeal, but also the authorities which might militate against it." 137 Wis. 2d at 100-101 (J.A. 117-118). The court added, ". . . the discussion requirement serves as a significant administrative aid to the reviewing court. . . . Hence, the discussion requirement operates as a judicial aid, serves an informational function and, equally important, enables the court to operate in a more efficient, expeditious and cost-saving manner." 137 Wis. 2d at 103 (J.A. 120).

Three of the seven justices dissented on the ground that the no merit rule violated the defendant's sixth amend-

ment right to effective assistance of counsel. 137 Wis. 2d at 104 (J.A. 121). The dissent noted that "(c)ounsel's filing a brief setting forth arguments against the defendant's position is a task that benefits the court but not the client. Accordingly, such a task is more properly assigned to an *amicus curiae* than the advocate." 137 Wis. 2d at 106-107 (J.A. 124).

SUMMARY OF ARGUMENT

The Wisconsin Supreme Court in this action has upheld the constitutionality of Wis. Rule § 809.32(1) which requires appointed counsel on an appeal as a matter of right to state in a no merit brief why any issues which might arguably support an appeal lack merit. This requirement is contrary to this Court's prior decisions of *Anders* v. *California*, 386 U.S. 738 (1967) and *Ellis* v. *United States*, 356 U.S. 674 (1958) which require counsel to act as an active advocate on behalf of his client, as opposed to acting in the role of *amicus curiae*. By following the rule and providing the court with reasons why an appeal of right lacks merit, counsel would effectively deprive his client of his right to an appeal, to due process on appeal, and to effective assistance of counsel. That rule, insofar as it requires a statement of reasons why the appeal lacks merit, is, therefore, contrary to the Sixth and Fourteenth Amendments to the United States Constitution.

ARGUMENT

WISCONSIN RULE § 809.32(1) DEPRIVES MR. MCCOY OF HIS RIGHTS TO APPEAL, TO DUE PROCESS ON APPEAL, AND TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL INSOFAR AS IT REQUIRES APPELLATE COUNSEL TO PROVIDE THE COURT WITH REASONS WHY A "NO MERIT" APPEAL LACKS MERIT.

Wisconsin law provides that all persons convicted of a crime be provided an appeal as a matter of right. Article I,

sec. 21, Wis. Const.; Wis. Stat. § 808.03 (1983-84); and Wis. Rule § 809.30 (1)(b). *See also State of Wisconsin* v. *Albright*, 96 Wis. 2d 122, 129-131, 291 N.W.2d 487 (1980). Moreover, art. I, sec. 7 of the Wisconsin Constitution provides a criminal defendant with the right to counsel, which includes effective assistance of counsel. *State of Wisconsin* v. *Koller*, 87 Wis. 2d 253, 260-261, 274 N.W. 2d 651 (1979). An indigent defendant has a right to publicly compensated counsel on appeal. Wis. Rule § 809.30(1)(b); Wis. Stats § 967.06 (1983-84). And finally, the Wisconsin Constitution provides for due process, which includes due process on appeal. Art. I, sec. 8, Wis. Const. *See also*, *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985). At issue in this case is whether another rule, Wis. Rule § 809.32(1), deprives a criminal defendant of his constitutional rights to an appeal, to due process in the appeal, and to effective assistance of counsel, contrary to the Sixth and Fourteenth Amendments to the United States Constitution.

Wis. Rule § 809.32(1) provides that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without arguable merit within the meaning of *Anders* v. *California*, 386 U.S. 738 (1967), the attorney shall file with the court of appeals a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. Appellant contends that the discussion requirement contained within the rule violates his right to appeal, to due process on appeal and to effective assistance of counsel.

This Court previously examined the role of appointed appellate counsel in *Anders* v. *California*, *supra*. The Court in *Anders* ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client, as opposed to that of *amicus*

curiae. 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. *Id.* If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. *Id.* That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Id.* After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

Id. at 745.

In reaching its landmark decision, the court rejected the California procedure where appointed counsel thoroughly studies the record, consults with the defendant and trial counsel and conscientiously concludes, and so advises the appellate court, that there are no meritorious grounds of appeal. *Id.* at 740-741, n. 2. The court then independently reviews the record. *Id.* In reaching its conclusion that the California procedure violated the fourteenth amendment, the court noted that it could not say that counsel acted in any greater capacity than merely as *amicus curiae*, that the procedure did not furnish petitioner with counsel acting in the role of an advocate, and that the procedure did not provide that full consideration

and resolution of the matter as is obtained when counsel is acting as an advocate. *Id.* at 743.

The Court's decision in *Anders*, in setting forth an acceptable procedure in "no merit" cases, appears to foreclose the discussion requirement in Wisconsin's "no merit" procedure, because a discussion of why issues lack merit would necessarily preclude counsel from acting in the role of an "advocate" on behalf of the client, at least in the ordinary meaning of the term. According to *Black's Law Dictionary*, 51 (5th Ed. 1979), the term advocate has the following definitions:

> Advocate. . . v. to speak in favor of or defend by argument. To support, vindicate, or recommend publicly.
>
> Advocate. . . n. One who assists, defends, or pleads for another. One who renders legal advice and aid and pleads the cause of another before a court or tribunal, a counselor. A person learned in the law, and duly admitted to practice who assists his client with advice, and pleads for him in open court. An assistant; adviser; a pleader of causes.

Webster's New World Dictionary, 20-21 (2d Ed. 1972), similarly defines advocate as "1. A person who pleads another's cause; specif., a lawyer. 2. A person who speaks or writes in support of something. . . . to speak or write in support of; be in favor of - SYN. see SUPPORT . . ." As these definitions clearly indicate, then, an advocate is one who supports, defends or pleads another's cause.

In contrast, the term "*amicus curiae*" has been defined as follows:

> ". . . means literally, friend of the court. A person with strong interest in or views on the subject matter of an action may petition the court for permission to file a brief, ostensibly on behalf of a party but actually

> to suggest a rationale consistent with its own views. . ."

Black's Law Dictionary, 75 (5th Ed. 1979).

> ". . . a person who offers, or is called in, to advise a court on some legal matter."

Webster's New World Dictionary, 44 (2d Ed. 1972). Thus, any person who files a brief suggesting a rationale consistent with his or her own views in an effort to aid or advise the court is acting in the role of *amicus curiae.*

While the court in *Anders* did not define what it meant by the term "advocate", a review of other decisions of this court fully supports appellant's contention that the discussion requirement is unconstitutional and contrary to the meaning and spirit of the *Anders* decision. In *United States* v. *Cronic*, 466 U.S. 648 (1984), this Court described the underlying purpose of the constitution's guarantee of the effective assistance of counsel when it stated that "truth . . . is best discovered by powerful statements on both sides of the question." *Id.* at 655. The court noted that this dictum described the unique strength of our criminal justice system, and went on to state that "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Id., citing Herring* v. *New York*, 422 U.S. 853, 862 (1975). The court stated that it is that "very premise" that underlies and gives meaning to the sixth amendment. *Id.*, 466 U.S. at 655-656. However, the court also noted that "if the process loses character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 456-457.

Similarly, this Court noted in *Strickland* v. *Washington*, 466 U.S. 668 (1984) that a fair trial is one in which

evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. *Id.* at 685. The sixth amendment relies on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the amendment envisions. *Id.* at 688. This Court described the role or function of counsel as an assistant to the defendant, from which derives "the overarching duty to advocate the defendant's cause," consult with the client and keep the client informed. *Id.* Moreover, counsel also has a duty to bear such skill and knowledge as will render the trial "a reliable adversarial testing process." *Id.*

The Court was describing the role of counsel in setting forth standards for evaluating ineffective assistance of counsel claims. The court clarified that in making the determination of whether counsel's acts or omissions were outside the range of professionally competent assistance, ". . . the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.* at 690. *Accord, Kimmelman* v. *Morrison*, 477 U.S. ____, 91 L.Ed.2d 305, 325-326 (1986).

Accordingly, this Court has repeatedly issued decisions which protect an appeal as of right and provide adequate and effective counsel on behalf of the defendant. For example, in *Evitts* v. *Lucey,* 469 U.S. 387 (1985), this Court held that a first appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. *Id.* at 396. The court noted that to prosecute an appeal, a criminal appellant must also face an adversary process that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. *Id.* The court added that

nominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate. *Id.* A "party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." *Id.* The court affirmed the issuance of a writ of habeas corpus where counsel failed to file the statement of appeal as required by Kentucky law. *Id.* at 389-391.

Similarly, this Court has rejected a Missouri procedure where trial counsel would file a motion for new trial which specifically designated issues to be considered on direct appeal, as well as a notice of appeal, and then move to withdraw. *Swenson* v. *Bosler*, 386 U.S. 258, 259 (1967). Under that procedure, the Supreme Court of Missouri would require preparation of the transcript for the appeal and then independently review the issues presented by counsel's motion on the basis of *pro se* briefs or no briefs at all. *Id.* The court noted that the assistance of appellate counsel in preparing and submitting a brief which defines legal principles upon which claims of error are based and which designates and interprets the relevant portions of the trial transcript may be of substantial benefit to the defendant, and that the failure to provide such violated the fourteenth amendment. *Id.*

This Court has also rejected the "clerk's transcript procedure" where an attorney, believing an appeal to be without merit, failed to provide the court with a complete record of the trial, and instead provided the court with the information and indictment, grand jury minutes, bailiff's oath, statement and instructions, and various orders and judgment entries. *Entsminger* v. *Iowa*, 386 U.S. 748, 749-752 (1967). The court again reiterated that appointed

counsel must function in the active role of an advocate, as opposed to that of an *amicus curiae*. *Id.* at 751.

The court has also ruled that appointed counsel must be provided with a copy of the court transcript in investigating the appeal. *Hardy* v. *United States*, 375 U.S. 277, 281 (1964). *Compare Lane* v. *Brown*, 372 U.S. 477 (1963) and *Eskridge* v. *Washington State Board of Prison Terms & Paroles*, 357 U.S. 214 (1958).

Indeed, one prior decision of this Court has already rejected a discussion requirement similar to the one used in Wisconsin. In *Ellis* v. *United States*, 249 F. 2d 478, 101 U.S. App. D.C. 386 (D.C. Cir. 1957), the United States Court of Appeals appointed counsel to represent appellant while requiring counsel to advise the court whether it was impossible to determine without a transcript if the appeal was frivolous or taken for delay. *Id.* at 478. Counsel presented the court with a memorandum containing a detailed statement of facts, a possible area of error, and reasons why there was not such merit as to warrant further prosecution of the appeal. *Id.* at 478-479. The Court of Appeals noted that two lawyers who reviewed the case pursued their task with diligence and performed their function of representing the appellant and advising the court. *Id.* at 479. The Court then denied the petition for leave to appeal. *Id.*

This Court reversed the decision of the Court of Appeals in *Ellis* v. *United States*, 356 U.S. 674 (1958). This Court concluded that the two attorneys appointed by the Court of Appeals performed essentially the role of *amici curiae*. *Id.* at 675. The court held that representation in the role of advocate is required. *Id.* While counsel may move to withdraw if the appeal is frivolous, the discussion requirement was rejected, and the case was

remanded because one of the issues could not be characterized as frivolous. *Id.*

The importance of *Ellis* cannot be ignored, as it was relied upon by this Court in *Anders*. 386 U.S. at 741-742. While the court clearly requires conscientious investigation by counsel, with counsel providing it with issues that might arguably support the appeal, this Court made it clear that it was for the court, not counsel, to decide whether the case is wholly frivolous. 386 U.S. at 744. Notably absent from the decision in *Anders* is the discussion requirement rejected in *Ellis*. Since *Anders* carefully set forth a procedure to be followed in no merit cases, the absence of the discussion requirement in *Anders* coupled with the decision in *Ellis* make it clear that counsel is not to perform the function of advising the court why the case lacks merit.

The Wisconsin Supreme Court in the instant action recognized that the procedure in Wisconsin under Wis. Rule § 809.32(1) ". . . goes beyond *Anders* and requires that the attorney file a brief which, in addition to articulating anything in the record which might support an appeal, includes a statement indicating why the appeal lacks merit." *State of Wisconsin ex rel. McCoy* v. *Wisconsin Court of Appeals, District I*, 137 Wis. 2d 90, 95, 403 N.W.2d 449 (1987). Nevertheless, the court concluded that while *Anders* does not sanction the use of the discussion requirement, it does not proscribe it, either. *Id.*, 137 Wis. 2d at 97.

The court in *McCoy* interpreted the discussion rule to require a statement of reasons why the appeal lacks merit, which might include a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the

record which might compel reaching that same result. *Id.*, 137 Wis. 2d at 100. The court viewed the rule as an attempt to provide the court with "notice" that there are facts on record or cases or statutes on point which would seem to compel a conclusion of no merit. *Id.* The court reasoned that the rule requires an attorney to fulfill a duty that co-exists with the duty owed to the client—that duty which is owed to the court. *Id.* The court noted that the discussion requirement serves as a significant administrative aid to the reviewing court. *Id.*, 137 Wis. 2d at 103. The "discussion requirement operates as a judicial aid, serves an information function and, equally important, enables the court to operate in a more efficient, expeditious and cost-saving manner." *Id.*

The problem with the court's reasoning in *McCoy* is that it is contrary to the "very premise of the adversary system of criminal justice" that partisan advocacy on both sides of the case will best promote the ultimate objective of convicting the guilty and freeing the innocent. *United States* v. *Cronic*, *supra*, 466 U.S. at 655. Under the Wisconsin no merit procedure, ". . . the process loses character as a confrontation between adversaries . . ." *Id.* at 466-467. Counsel would no longer be serving the function of an assistant to the client with an "overarching duty to advocate the defendant's cause" while subjecting the appeal to the adversarial testing process which the sixth amendment envisions. *Strickland* v. *Washington*, *supra*, 466 U.S. at 685, 688, 690. Instead, counsel would be serving as an administrative aid to the reviewing court while fulfilling a duty owed not to the client, but to the court. *McCoy*, 137 Wis. 2d at 100, 103. This, of course, counsel cannot do. *Ellis* v. *United States*, 356 U.S. at 675; *Anders*, 386 U.S. at 744-745.

Appellant would note that one circuit of the United States Court of Appeals recently ruled that a criminal

defendant was denied effective assistance of counsel when his appellate lawyer did essentially what the Wisconsin Supreme Court has required in *McCoy*. In *Robinson* v. *Black*, 812 F.2d 1084 (8th Cir. 1987), the court concluded that "counsel did not act as an advocate when he briefed all issues in favor of the government and concluded Robinson's claims were meritless. Robinson had a right to expect counsel to brief and argue his case to the best of counsel's ability showing the most favorable side of defendant's arguments. Counsel changed the adversarial process into an inquisitorial one by joining the forces of the state and working against his client." *Id.* at 1086-1087. Excerpts from the no merit brief in that case make it clear that counsel identified issues that might arguably support the appeal and then provided reasons why the issues lacked merit. *Id.* at 1086, n. 7. Yet the Eight Circuit concluded that the assistance afforded to Robinson on direct appeal violated the sixth amendment. *Id.* at 1087.

Similarly, another circuit of the United States Court of Appeals has concluded that the constitution is violated when counsel for an appeal as of right adds the weight of his opinion to the position of his client's adversary. *Harders* v. *State of California*, 373 F. 2d 839, 843 (9th Cir. 1967). In *Harders*, the attorney appointed to conduct the appeal was relieved of further responsibility after reporting to the court that he believed there was no merit to the appeal. *Id.* at 842. The Ninth Circuit reasoned that the traditional duty of an advocate is to uphold the contentions of his client, and that counsel should not voluntarily undermine them. *Id.* The order dismissing the appeal was vacated. *Id.* at 843. *Accord*, *Smith* v. *United States*, 384 F. 2d 649, 650 (8th Cir. 1967) ("The cause of advocacy is not served to read a brief filed by appellant's own counsel asserting the government's position in the case.").

And notably, this Court has vacated another decision of the United States Court of Appeals for the Second Circuit and remanded the matter for reconsideration in light of *Anders* where counsel petitioned to withdraw after providing the court with an affidavit summarizing the evidence, a possible issue and a conclusion that the only possible legal issue was without any basis. *Camodeo* v. *United States*, 387 U.S. 575 (1967), *vacating United States* v. *Camodeo*, 367 F. 2d 146 (2nd Cir. 1966).

In addition, the United States Court of Appeals for the Eleventh Circuit recently held that

> [i]f the *Anders* procedure is to work, therefore, the lawyer filing the *Anders* brief must, to the extent possible, remain in his role as advocate; at this stage of proceeding it is not for the lawyer to act as an unbiased judge of the merit of particular grounds for appeal. He or she is required to set out *any* irregularities in the trial process or other potential error which, although in his judgment not a basis for appellate relief, might, in the judgment of his client or another counselor or the court, be arguably meritorious. This is done in order that those potential claims not be overlooked. The objective of these potential claims is for the court's determination, not the advocate's.

United States v. *Blackwell*, 767 F.2d 1486, 1487-88 (11th Cir. 1985). In *Blackwell*, the court denied counsel's motion to withdraw on the basis that the appeal was frivolous where counsel filed a brief in support of the motion with eight pages of excerpts from testimony, and concluded that he was unable to find anything which might arguably support an appeal. *Id.* at 1488.

Appellant notes that other jurisdictions have adopted procedures which preclude the discussion requirement as envisioned in *McCoy*. For example, the West Virginia

Supreme Court has indicated that it is not appellate counsel's prerogative to determine finally the merits of the appeal. The court, not counsel, must decide if the appeal is wholly frivolous. *Turner* v. *Haynes*, 245 S.E.2d 629, 630 (W. Va. 1978) and *Rhodes* v. *Leverette, Warden*, 239 S.E.2d 136, 139-140 (W. Va. 1977). While the discussion requirement was not at issue in those cases, the court made it clear that ". . . appointed counsel support his client's appeal to the best of his ability." *Id.* at 139.

In *People* v. *Feggans*, 67 Cal. 2d 444, 62 Cal. Rptr, 419, 432 P. 2d 21 (1967), the Supreme Court of California criticized the brief filed by the original appellate counsel, noting that after raising seven points in a no merit letter to the court, counsel sought to show the court that the case had no merit. *Id.*, 432 P.2d at 23. The court was likewise critical of the fact that counsel did not set forth relevant facts, cited no applicable authorities, and argued the case against the client. *Id.*, 432 P. 2d at 23-24. The court concluded that such representation did not constitute the assistance of counsel required by *Anders*. *Id.*, 432 P. 2d at 24.

The Supreme Courts of Utah and Arizona have also strictly adhered to the procedure described in *Anders* without requiring a discussion of why the case lacks merit. *State of Utah* v. *Clayton*, 639 P.2d 168, 169-171 (Utah 1981); *State of Utah* v. *Varner*, 692 P.2d 753, 754 (Utah 1984); and *State of Arizona* v. *Leon*, 451 P.2d 878, 880 (Ariz. 1969). *See also State of Ohio* v. *Duncan*, 385 N.E.2d 323, 57 Ohio App. 2d 93, 11 O.O.3d 83 (Ohio App. 1978).

In New Jersey, the Superior Court held that a defendant was deprived of his right to effective assistance of trial counsel because he was not advised of his right to appeal

and the right to counsel to prosecute the appeal. *State of New Jersey* v. *Allen*, 239 A.2d 675, 679, 99 N.J. Super. 314 (1968). In reaching its decision, the court described the procedures to be followed when a defendant exercises his right to appeal. The court stated that "[o]nce a defendant exercises his right to appeal, his appellate counsel must be an advocate; he does not decide whether the claim will be successful as argued by the state. . . . That task is for the courts." *Id.* The court then adopted the procedure set forth in *Anders*. *Id.*

And in Florida, the appellate court, in striking as inadequate a purported *Anders* brief, adopted a procedure almost identical to the one employed by appellate counsel in the instant case. In *Smith* v. *State of Florida*, 496 So. 2d 971 (Fla. Dist. Ct. App. 1986), the court ruled that a statement of judicial acts to be reviewed without addressing each issue separately and indicating how and where each arose in the record was inadequate. *Id.* at 974. The procedure to be followed instead was for appellate counsel to specify where the judicial act arose in the record, what transpired, the lower court's ruling, the apparent basis for the trial counsel's objection and basis for suggesting it was error. *Id.* "Counsel should then present such argument as can reasonably be made in support of the defendant's position on each designated act, with appropriate citation to the record and pertinent authority, if any." *Id.* Defendant's brief should state that such designations present wholly frivolous issues. *Id.* While counsel should not make a wholly frivolous argument, he should not brief the case against the client either. *Id.* The state can then file an answer brief indicating the lack of merit to the case. *Id.*

Appellant recognizes that all jurisdictions which have considered the question of what is required of appellate counsel in an *Anders* situation are not in agreement.

Nevertheless, many which have not adopted the position proposed by appellant have still fashioned remedies which would not require counsel to set forth reasons why the action lacks merit or brief the case against the client.[1] Some courts have advanced the requirement of filing frivolous briefs with the court, completely disavowing the *Anders* procedure. *Huguley* v. *State*, 253 Ga. 709, 324 S.E.2d 729 (1985). *Compare*, *State* v. *McKenney*, 98 Idaho 551, 568 P.2d 1213 (1977). Another court has modified the *Anders* approach, suggesting that the attorney should not seek to withdraw, but advance the weak or frivolous issues on behalf of the client under the theory that the court must deal with those issues in any event. *State* v. *Gates*, 466 S.W.2d 681, 684 (Mo. 1971).[2]

Other jurisdictions have determined that the court should appoint another attorney altogether when appellate counsel has determined that the appeal lacks merit in an effort to protect the defendant's right to appeal. In *State* v. *Lewis*, 291 N.W.2d 735 (N.D. 1980), the North Dakota Supreme Court distinguished *Anders* because California law does not provide for an appeal as a matter of right, while North Dakota law does. *Id.* at 737. Thus, the need for an *Anders* proceeding was eliminated. *Id.* Instead, the proper procedure when court-appointed defense counsel believes the "appeal is without merit is to appoint another attorney to represent the defendant on

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[1] *But see*, *United States* v. *Edwards*, 780 F.2d 712, 715 (7th Cir. 1986); *Nickols* v. *Gagnon*, 454 F. 2d 467, 469 (7th Cir. 1971); *People* v. *Lowery*, 445 N.Y.S. 992 (1982); *Caraway* v. *State*, 560 S.W.2d 690 (Tex. Cr. App. 1978); and *Commonwealth* v. *McClendon*, 434 A.2d 1185, 1187-88 (Pa. 1981), which reject appellant's position that it is improper to inform the court why the case lacks merit.

[2] The Wisconsin Supreme Court has adopted a rule prohibiting the filing of frivolous briefs. Wis. Rule § 809.25(3).

appeal as soon after the initially appointed attorney makes his opinion as to frivolity known to the court as is practical." *Id.* The court no longer hears any proceedings designed to determine whether or not an appeal is frivolous. *Id.* And in Alabama, the court still requires the filing of an *Anders* brief, but after permitting counsel to withdraw, new counsel is appointed. *Ex Parte Sturdivant*, 460 So. 2d 1210 (Ala. 1984), *on remand*, 460 So. 2d 1213 (Ala. 1984) *cert. denied*, 470 U.S. 1027 (1985).

The State of Oregon has fashioned yet another approach which is designed to keep counsel from providing reasons why issues lack merit. In *State* v. *Horine*, 669 P.2d 797 (1983), *cert. dismissed*, 466 U.S. 934 (1984), the Court of Appeals agreed that it is not the function of counsel to decide the merits of the appeal. *Id.* at 805. However, the court also stated that the right to counsel does not require counsel to present frivolous issues. *Id.* As a result, the court concluded that when appellate counsel determines that the case lacks merit, counsel should notify the court and the appellant, and the appellant is allowed to raise whatever issues he or she chooses to raise. *Id.* at 806. "Aside from the opportunity to present issues *pro se*, the appellant is not entitled to further protection at state expense." *Id.* The court will not search the record for error anymore than it does in regular appeals. *Id.*

The states of Idaho and Massachusetts have both created new procedures on appeal under state law where counsel is no longer permitted to withdraw as counsel on the basis of *Anders* because it would prejudice the client's appeal. *State* v. *McKenney*, 98 Idaho 551, 568 P.2d 1213, 1214-15 (1977); *Commonwealth* v. *Moffett*, 418 N.W.2d 585, 591-92 (Mass. 1981). Counsel must refrain from arguing against the client's claim in the brief. *Id.* While both

courts felt that providing reasons why an appeal lacked merit might comply with *Anders*, those reasons would no longer be accepted in those states. *Id.*

Other jurisdictions which do not appear to require counsel to provide reasons why an appeal lacks merit include Wyoming, Tennessee and Delaware. *Eaton* v. *State*, 660 P.2d 803, 805, n. 3 (Wyo. 1983); *State* v. *Henderson*, 425 S.W.2d 593, 596 (Tenn. 1968); and *Smith* v. *State*, 248 A.2d 146, 147 (Del. 1968).

The Wisconsin Supreme Court relied upon the decision of *Nickols* v. *Gagnon*, 454 F. 2d 467 (7th Cir. 1971) in reaching its decision. *McCoy*, 137 Wis. 2d at 97-98 (J.A. 114-115). In *Nickols*, the attorney appointed to prosecute the appeal did not prepare on advocate's brief on behalf of the client, but instead prepared a detailed letter identifying issues and demonstrating the absence of merit. *Id.* at 468-469. The United States Court of Appeals, instead of following *Anders*, opined that *Anders* has been interpreted as requiring a request to withdraw to "be accompanied by a brief arguing anything in the record that might support appeal." *Id.* at 470. The specific quotation from *Anders* states that request to withdraw "must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744. Thus, the Court of Appeals erred in viewing the "interpretation" as attaching paramount importance to the form, rather than the substance, of a lawyer's representation. *Nickols*, 454 F. 2d at 470. There was no loose interpretation of *Anders*, as this court clearly created the requirement of what was to be filed. *Nickols* is therefore inconsistent with *Anders*. *See e.g.*, Pengilly *Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal*, 9 Crim. Jus. J. 45, 55-56 (1986).

Moreover, the fear expressed in *Nickols* that a subtle but invidious distinction between appointed and retained counsel might develop is without substance, as counsel, when filing an *Anders* brief, is allowed to move to withdraw after advising the court that the case is wholly frivolous. *Anders*, *supra*. By "flagging" the case in this fashion, no distinction will be created.

Appellant submits that the requirement of Wis. Rule § 809.32(1) that he provide reasons why the appeal lacks merit is directly contrary to *Anders* and would deprive Mr. McCoy of his right to appeal, due process on appeal, and effective assistance of appellate counsel. Counsel must act as an advocate in order to protect those rights. Counsel cannot do that by acting as a friend of the court or briefing the case against the client. The state is ably represented by its own attorneys and has been served with a copy of the brief, and can indicate in its brief why the case lacks merit, should the court require one. Counsel, however, should not deliberately violate his client's sixth and fourteenth amendment rights by being less than an advocate.

Mr. McCoy wants to have his appeal heard on the merits. Under *Anders*, *Strickland* and *Ellis*, counsel must assist him in that endeavor. While counsel cannot present frivolous claims to the court without first identifying that the *Anders* procedure is being used, counsel is nevertheless required to protect the appeal, even though counsel questions its merit. Thus, counsel cannot, as appellant's *assistant*, tell the court why the case lacks merit. To do so would simply not protect McCoy's rights to appeal and to effective assistance of counsel.

In the instant case, counsel has done no more nor less than strictly apply *Anders* to the facts of this case. After

determining that the appeal was frivolous the court was so advised and permission to withdraw was requested (J.A. 14, 27). 386 U.S. at 744. A brief referring to anything in the record that might arguably support the appeal was provided with the request (J.A. 11-27). 386 U.S. at 744. A copy was furnished to the appellant (J.A. 28). 386 U.S. at 744. The Court provide Mr. McCoy with thirty (30) days to file any response he wished the court to consider (J.A. 28). 386 U.S. at 744. Now the court, not counsel, must fully examine the record to decide whether the case is wholly frivolous. 386 U.S. at 744. *Anders* simply requires no more, and counsel is in full compliance.

Appellant submits that the *Anders* procedure should not be modified so that counsel is placed in the position of either acting as *amicus curiae* or briefing the case against his client. Since *Anders* specifically rejects that approach, *Id.*, Wis. Rule § 809.32(1) is in violation of the sixth and fourteenth amendments insofar as it requires reasons why the case lacks merit. Thus, this court should so find and reaffirm the procedure outlined in *Anders*.

Appellant recognizes that counsel is required to advise the defendant why his or her case lacks merit as part of the process in determining whether a no merit report should be filed. That information, however, should be provided to the client, not the court. Surely, appellee would not suggest that discussions of tactics at trial with the defendant should be disclosed to the court. Similarly, the court should not be made privy to discussions of tactics on appeal. Once counsel determines that a case is frivolous and without arguable merit, the client should be advised so that the client can make an informed decision as to how to proceed. An evaluation of the case should be presented to the client, who can then decide whether to proceed *pro se*, whether to waive the appeal, or whether

to require a no merit report. Once the client makes that decision, the case can then proceed, and if a no merit report is requested, the procedure under *Anders* should govern. Any discussion of why the case lacks merit should not be made to the court, however, as counsel does not represent the court and is not supposed to act as an *amicus*.

This Court has recognized that a criminal appellant must face an adversary process that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. *Evitts* v. *Lucey*, 469 U.S. at 396. If nominal representation on an appeal is not sufficient to render the proceedings constitutionally adequate, *Id.*, then Wisconsin Rule § 809.32(1) is surely unconstitutional, for it merely supplies nominal representation. Under that rule, the client loses the services of a partisan advocate in favor of an attorney concerned with a duty owed to the court. Mr. McCoy is entitled to receive better than that.

As Wisconsin law provides that Mr. McCoy be provided an appeal as a matter of right with publicly compensated counsel for that appeal, he is entitled to receive due process and effective assistance of counsel. The Wisconsin no merit rule, insofar as it requires a discussion of why any issues lack merit, fails to provide him with that. Therefore, appellant respectfully requests that this court reverse the Wisconsin Supreme Court with directions that the No Merit brief filed on behalf of Mr. McCoy in his appeal (J.A. 11-27) be accepted as constitutionally adequate.

CONCLUSION

In light of the foregoing, appellant respectfully requests that this Court reverse the Wisconsin Supreme Court and hold that Wis. Rule § 809.32(1) is unconstitutional, and remand the matter with directions to prohibit the Wisconsin Court of Appeals, District I, from striking the brief filed on behalf of Mr. McCoy in his appeal and from requiring counsel to inform the court why the issues lack merit.

Respectfully submitted,

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